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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 4

PETER VAN DER WEYDE,

Petitioner,

vs.

OCEAN TRANSPORT COMPANY, LTD., A CORPORATION, CLAIMANT OF THE STEAMSHIP "TAIGEN MARU", ETC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION.

JOHN P. HANNON,
WM. P. LORD,
T. WALTER GILLARD,
ANDREW G. HALEY,
Counsel for Petitioner.

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Statement.

A review is asked in this case because of the irreconcilable conflict involving an important question of maritime law, between the several circuit courts and the Circuit Court of Appeals for the Ninth Circuit. Two recent decisions are in hopeless conflict and both involve a determination of the identical question.

This case involves the right of a seaman, under signed articles on a vessel chartered to an American corporation, for voyages between the Columbia River, the Orient and return. Outside of the master and commanding officers, the vessel was manned by a picked-up crew secured in Portland under articles to be discharged in Pacific Coast ports. The owner had no statutory agent in the United States.

The Circuit Court of Appeals for the Ninth Circuit dismissed the case for want of jurisdiction. It held that treaty provisions between Norway and the United States deprived the court of jurisdiction. (*Van der Weyde* v. *Ocean Transport Co.*, 73 F. (2d) 922.)

In the case of *The Eir* (*Persson* v. *Falsen*), 60 F. (2d) 124, the Circuit Court of Appeals for the Fourth Circuit held exactly to the contrary, and assumed jurisdiction on account of the manifest injustices of relegating a seaman, under such circumstances, to the foreign courts.

Believing that the Circuit Court of Appeals for the Ninth Circuit was wrong, we have asked for a review of this question. The question also becomes important because the question is frequently arising and will frequently arise in the future. A review of the cases will show that the bar is far from being satisfied with the application of the rule by the trial courts.

Bearing in mind that there is a conflict in the decisions on an important point, we will state the facts of this case with a view of showing that a manifest injustice has been done and accomplished by attempting to apply too strictly the "law of the flag", and too great an accentuation of a supposed inviolability of vessels to local laws while within territorial waters.

On the 17th of March, 1922, libelant was employed as a seaman on the S. S. Luise Nielsen for a round trip voyage between the Columbia River and the Orient, to be dis-

charged at the Port of Portland. The vessel at that time was chartered to an Oregon corporation known as the Asiatic-American Steamship Company, but under the terms of the charter the registry of the vessel remained under the laws of Norway and the crew were in the employ and pay of the owners. Master and commanding officers of the vessel came from Norway, but able and ordinary seamen were employed in Portland and Astoria. The vessel was owned by B. Stolt Nielson & Company, of Haugesund, Norway.

On the 16th of May, 1922, libelant had been sick several days as a result of poor rations served the crew, and he was forced to work by the master while sick, and met with certain personal injuries due to the failure to properly light the vessel, his enfeebled condition, by walking into an open and unguarded hatch, without any lifeline placed around it. This accident happened on the high seas on the return voyage and about six days out from the Columbia River.

On the 15th of September, 1922, libelant filed suit in the United States District Court for Oregon, libeling the Luise Nielsen. After the libel was filed the Norwegian consul at Portland filed a protest against the court taking jurisdiction on the grounds that the controversy involved a controverted claim between a citizen of Holland and a vessel owned by a Norwegian corporation, and on the 9th day of April, 1924, there was entered an order by the court granting the petition for intervention by the Norwegian consul, and at the same time the intervention was allowed. The claim being at issue the court dismissed the libel on June 2, 1924. The Norwegian consul, who was an attorney of the Federal Court in Portland, personally appeared and assured the court that the laws of Norway provided for an express compulsory workmen's compensation insurance as to seamen injured on vessels belonging to Norway, and

advised the court that there had been paid approximately $1,800 on account of medical treatment and hospitalization, and stated to the court that compensation would be paid Van der Weyde. Thereupon the court entered a decree dismissing the libel. No appeal was taken from this dismissal.

The vessel was thereafter sold by the owners to the claimant herein, Ocean Transport Co., Ltd., and was renamed the Taigen Maru.

On the 26th day of January, 1933, this vessel was berthed at Longview, Washington, and the vessel was libeled in the United States District Court for the Western District of Washington, Southern Division, upon the same cause of suit referred to above. Thereafter, C. Stang Anderson, acting consul of the Kingdom of Norway, resident at Seattle, petitioned the court for leave to intervene for the purpose of filing exceptions and exceptive allegations directed to the libel. Paragraph X of the exceptive allegations contains the following:

X.

"That despite the fact that said steamship, formerly the 'Luise Nielsen', now the 'Taigen Maru', is now a Japanese vessel, and no longer a Norwegian vessel, your petitioner as Norwegian consul is nevertheless officially concerned, by virtue of the fact that in making sale of said steamship to the present Japanese owner thereof, the former Norwegian owner, B. Stolt Nielsen & Company, Inc., obligated itself to deliver said steamship 'free from all debts and encumbrances', as a result of which obligation such former Norwegian owner is interested in the adjudication of any claims against said vessel, in accordance with the rights and obligations arising from the Norwegian law effective at the time such claim accrued."

The exceptive allegations contain other matters which we do not believe are material to the presentation of our statement of the controversy, such as excerpts from the Norwegian law, Articles of Seamanship between Van der Weyde and the master of the steamship, reference to the Norwegian Seamen's compensation act, and reference to the formed suit, to which reference has already been made, by way of a plea of *res judicata* and *laches*.

Van der Weyde filed a response to the exceptions of the claimant, which contained the following allegations:

I.

"Libelant admits each and every allegation contained in Paragraph I thereof, except libelant denies that the decree referred to in said paragraph is a final decree, completely determining and adjudicating the rights and obligations of said libelant and of said steamship Luise Nielsen, arising out of all causes of action stated by or involved in said Amended Libel, and further alleges that during the hearing of said intervention, the said Norwegian consul, acting for and on behalf of the owners and for and on behalf of his government, promised the said R. S. Bean, the judge presiding, that he would see that the compensation according to the laws of Norway would be paid libelant, and for this reason the decree dismissing said suit was entered, and said suit was never heard, and further alleges that the said proceedings were not tried upon the merits as to whether or not said steamship was seaworthy, and libelant had a cause of suit to recover damages for his said personal injuries according to the course of the general maritime law as administered by the courts of the United States."

A separate response was filed to the exceptive allegations of the Norwegian consul. In this response it was alleged that Van der Weyde was born in The Netherlands and

deserted vessel in the United States in 1907, and has ever since been a resident alien of the United States, and has followed the vocation of a seaman on vessels of American registry. He then set up his employment as a seaman under the agreement referred to, and that he met with a certain injury, and that at the time of the hearing on the protest of the Norwegian consul in Portland against the court taking jurisdiction, it was well known that he was totally and permanently disabled. This response also contains the following averments:

"IV.

"That at the time of the trial of said suit, when the said Norwegian consul at Portland did claim in open court that under the laws of the Kingdom of Norway libelant was entitled to receive and be paid a compensation, which laws are similar in import to the compensation laws now adopted by many states, and did state that said Peter Van der Weyde would be paid said compensation, and that R. S. Bean, the judge trying said proceedings, did thereupon refuse to take jurisdiction of the proceedings against said S. S. Luise Nielsen to recover damages for the personal injuries sustained by said Peter Van der Weyde, as alleged in his libel; that at said time libelant was still disabled and suffered great physical pain, and it was libelant's intention to return to his mother's home in The Netherlands, where libelant would be able to live in comparative comfort on the compensation which would be paid him under the said Norwegian laws; that time expired and libelant called upon said Norwegian consul and requested the said Norwegian consul to pay said compensation; that said Norwegian consul informed libelant that said 'money was lying in Norway' under a Norwegian insurance act; that every few months thereafter libelant did call at the office of said consul to inquire whether said compensation had been received, and time kept passing without the payment of said compensation, or

the exhibition of any written instructions by said Norwegian consul regarding the compensation payable to libelant; that thereupon on the 11th day of January, 1929, libelant wrote the Minister from The Netherlands as follows:

'January 11, 1929.

'The Minister from The Netherlands,
Washington, D. C.

'SIR:

'At the request of Peter Van der Weyde, a citizen of Holland, residing in the United States, we are submitting to you for such action as may be appropriate the question of securing him money on account of personal injuries sustained while employed as a sailor on the S. S. 'Luise Nielsen'. The facts are that Mr. Van der Weyde shipped on a round trip voyage from Portland, Oregon, to the Orient and return. The vessel was flying the Norwegian flag but had been chartered to the Asiatic American Steamship Company, an Oregon corporation. The charter did not change the ownership to that of *pro hac vice* of the Oregon company, so the vessel still remained a Norwegian vessel.

'On the 16th day of April, 1922, Mr. Van der Weyde met with an accident by falling through a hatchway which had been left open and was unlighted. The accident resulted in a fracture of the right femur, injuries to the back and head, and without going into detail as to the extent of the injuries, we may say that his injuries are so permanent and disabling that he never again will be able to resume heavy employment. There is some light work which he might possibly be able to do.

'Believing that the case would be governed by the principles of American maritime law, inasmuch as the employment was made in the United States and contemplated a round trip voyage, etc., a libel was filed against the vessel with a view of securing an indemnity for the injuries done. There was no legal defense to this action because the negligence was so flagrant,

but the court on the motion of the attorneys for the Steamship Company, dismissed the suit on the theory that the 'law of the flag' controlled and bound the rights of the seamen on the ship, and under the laws of Norway no lien was given against the ship in such cases, but that these laws provided a compensation in the form of monthly payments.

'It was loudly proclaimed in court that the company had expended vast sums of money in endeavoring to effect a cure of the injured seaman, and that they desired to make payments of compensation in accordance with the laws of Norway, and it was upon this suggestion that the court took the view that he would not apply the American maritime law to the case, inasmuch as a fixed compensation was already provided, and he would not therefore exercise his discretionary right and refused to apply the law of the United States.

'Repeated demands were made by the local consul for The Netherlands upon the Norwegian consul to pay this compensation, but it has never been paid.

'We are writing with a view that you take such official action as may be necessary to secure the payment of this compensation. Further information will be gladly furnished if required.

'Respectfully yours,

LORD & MOULTON,
By WM. P. LORD.'

"Libelant received the following answer to the above letter:

'Royal Netherland Legation

Washington, D. C., 9 February, 1929.

'SIRS:

'In answer to your letter of January 11, 1929, I have the honor to inform you that the Norwegian Steamship Company, B. Stoltz Nielson & Company, of Haugesund, has done everything that can be claimed by Peter Van der Weyde on ground of the treaty of March 7, 1911,

between The Netherlands and Norway concerning maritime accidents and indemnification. Further, the convention of January 9, 1925, between said countries is not applicable in this case as Van der Weyde does not reside either in The Netherlands or in Norway.

'Yours very truly,

J. H. VAN ROYES,
Netherland Minister.'

V.

"That thereafter libelant continued to request the payment of said compensation, but said compensation has never been paid; that in the meantime, as alleged in the libel, said steamship was sold, but libelant is informed and believes and therefore alleges it to be true, that said steamship was sold by the owners with a warranty to said owners against all claims for damages of every nature and description incurred prior to said sale, and the terms of said sale provided that the purchasers of said steamship would be indemnified against any and all loss on account of any claims being made by any person prior to said sale, and that the vendors would defend any and all such suits, and said steamship was protected by a P. and I. policy with the Assuranceforeningen Skuld of Oslo, Norway, by the terms of which the former owners were insured against loss by reason of the making of any claim, and said policy was in full force and effect at the time libelant was injured, and at the time said vessel was sold; that libelant's said cause was not tried on the merits as to the charge whether said vessel was unseaworthy, and was tried only upon the intervention of the said Norwegian consul at Portland, Oregon.

VI.

"That said vessel, to libelant's knowledge, has not been within the District of Oregon for a long time prior to the filing of the libel herein; that libelant would have again libeled said vessel if said vessel had been within the jurisdiction of a court within a reasonable

distance of where libelant resided, except for the fact that libelant believed that he would be paid the compensation as alleged.

VII.

"That libelant believes and therefore alleges it to be true that the present owners of said steamship are not interested in the result of libelant's claim, but on the contrary the defense of this claim is being made by the Assuranceforeningen Skuld of Oslo, Norway; that due to the fact that jurisdiction of the court in said proceedings was discretionary, libelant prays that his rights be determined and ascertained, that is to say: that this Court proceed and assess damages under the general principles of the maritime laws of the United States relating to seamen, if the court should be so advised after the hearing of the testimony herein, or if the court be of the opinion that the benefits of the Workmen's Compensaton Act should be paid libelant, the court should compel the intervenor to arrange for the payment of said compensation. Libelant further avers that the parties hereto are not prejudiced by the loss of witnesses, inasmuch as there are two witnesses to said accident, viz., Wm. Butnek, who resides in Portland, Oregon, and Jack Vanderwerf, who resides near Scappoose, Oregon, both actual witnesses to said accident."

The matter came on for hearing before Hon. Edward R. Cushman, District Judge, on the exceptions and exceptive allegations, and responses referred to, and on the 28th day of January, 1933, the court entered the following order:

"Order

"The above entitled cause having duly and regularly come on for hearing upon January 9 and 23d, 1933, before the above entitled court, the undersigned judge presiding, upon the exceptive allegations of the Intervenor, C. Stang Anderson, as Consul of the Kingdom of Norway, and upon the exceptive allegations of the

claimant, Ocean Transport Co., Ltd., upon the latter date Libelant appearing by his proctor, Wm. P. Lord, and orally responding to such exceptive allegations, and having been allowed further time in which to reduce to writing and file such responses and such having been done, and the court having given consideration to the consular protest against jurisdiction being entertained in the above entitled cause, and libelant's response thereto, and having concluded that, in the exercise of its discretion the court should not hear said cause upon the merits,

"Now, therefore, it is hereby ordered:

1. That said cause be and the same hereby is dismissed.

2. That the release bond and the stipulations for costs, filed by said claimant and said intervenor, be and they are hereby discharged, and the sureties thereon exonerated.

3. That said intervenor and said claimant have and recover from libelant lawful costs hereinafter to be taxed.

Done this 28th day of January, 1933.

EDWARD E. CUSHMAN,
Judge."

We wish to call attention to the fact that the real party in interest in this proceeding is a Norwegian insurance company, and to the fact that the witnesses to this accident still reside in and about Portland.

An appeal was taken to the Circuit Court of Appeals on the 19th of November, 1934, an opinion was filed wherein the court held that the district court lacked jurisdiction of the suit by reason of certain provisions of the Treaty of Commerce and Navigation between the United States and the kingdoms of Norway and Sweden, providing that consuls shall have the right, as such, to sit as judges in differences which arise between the captain and crews of vessels,

without interference of the local authorities. The court then cited a number of decisions sustaining the rule that the courts of the United States have no right to take cognizance of controversies arising between the master and members of the crew. In commenting upon the case of *The Eir*, 60 F. (2d) 124, relied upon by libelant in this case, holding that it was an abuse of the discretion of a trial judge to refuse to assume jurisdiction in a case where a Swedish seaman brought suit against a Norwegian steamship for injury while working on board as a member of her crew in a United States port, the Circuit Court of Appeals said that the court had overlooked the effect of the treaty provisions. We believe that the writer of the opinion in the *Van der Weyde* case failed to recognize and apply the rule that courts will assume jurisdiction in suits between foreigners where the refusal will work manifest injustice to one of the parties.

Assignment of Errors.

Now comes the above named libelant herein and says that in the record and proceedings in the above entitled cause there is manifest error and said libelant now makes, files and presents the following assignment of errors upon which he will rely.

I.

The court erred in dismissing said cause.

II.

The court erred in holding that jurisdiction between the libelant and the intervenor, C. Stang Anderson, as consul of the Kingdom of Norway, was a discretionary jurisdiction in the court.

III.

The court erred in entertaining the exceptive allegations and in not requiring the claimant and respondent and intervenor to answer.

Wherefore libelant prays that the decree herein be reversed and that the court try this cause *de novo* in this Court and award libelant such damages as he has sustained by reason of the wrongful acts complained about in the libel.

Points and Authorities.

I.

It was an abuse of discretion for the District Court to recognize the protest of the Norwegian consul and refuse to retain jurisdiction of the cause and try the case on the merits.

The Eir, 60 F. (2d) 124, 1932 A. M. C. 1042.
Canada Malting Co. Ltd., v. *Paterson Steamships, Ltd.,* 285 U. S. 413, 1932 A. M. C. 512.
The Apurimac, 1926 A. M. C. 703, 12 F. (2d) 500.
The Tricolor, 1933 A. M. C. 919.

II.

The decree of the District Court of Oregon is not a bar to the maintenance of this suit for the reason that jurisdiction was refused upon a promise made to the court by the Norwegian consul that libelant would be paid compensation under the Norwegian Seamen's Compensation Act. This promise is analogous to securing judgment of the court upon promise of compromise which was not performed, and the decree is therefore subject to be set aside under such precedents as

Freeman on Judgments, 5th Ed., Sec. 1214, p. 2523.
Freeman on Judgments, 5th Ed., Sec., 1243, p. 2587.
Chicago, R. I., etc., v. *Callicothe,* 267 F. 799.
U. S. v. *Throckmorton,* 98 U. S. 61.

III.

The particular circumstances of this case estop the claimant from asserting the defense of laches.

The Fulton, 54 F. (2d) 467.

Griffith v. *Seaboard Midland Petroleum Co.*, 1933 A. M. C. 911.

ARGUMENT.

I.

Discretionary Jurisdiction.

The trial court refused to take jurisdiction upon consideration of the consular protest and found that it should not hear the cause on the merits. No other question was considered by the court, but an express finding is made by the court that it would not exercise its discretion in retaining jurisdiction. There undoubtedly are many cases holding that a court of admiralty will not hear controversies between foreigners where the rights of the parties can be as readily administered by the law and courts of their own country. It has been a custom for consuls to enter a protest in cases where claims arise between resident aliens and the country which they represent. Such proceedings are an easy means of blocking litigation. In reference to seamen's claims there are many decisions of American courts holding that the court would leave controversies between seamen and the owners of foreign vessels to be determined by the consular agent or the courts of the vessel's nationality. Although the courts have always been careful in the statement of the rule to limit refusal to take jurisdiction wherein there would be a clear denial of justice to the seaman.

Judge Bean undoubtedly felt that there would be no denial of justice to Van der Weyde by the Kingdom of Nor-

way. It was shown in court that the Norwegian government had incurred approximately $2,000 expenses in treating Van de Weyde's injuries while in the hospital, which in itself showed good faith on the part of the Norwegian authorities, and undoubtedly the court thought, as many lawyers have learned from experience, that the payment of a monthly compensation to Van der Weyde, in view of his disabling injury, would be better for his interest than the payment of a lump sum of money which would be soon dissipated, and it was therefore not a denial of justice to Van der Weyde that the court refused to exercise jurisdiction on his claim for an indemnity against the vessel, but quite on the contrary the ends of justice would be served by remanding Van der Weyde's claim to the consul to carry out his promise that compensation would be paid Van der Weyde under the Norwegian compensation act.

The responsive allegations to the intervention of the Norwegian consul at Seattle show that the Norwegian consul stated in open court at Portland that Van der Weyde would be paid compensation and that at the time libelant was disabled and it was his intention to return to his mother's home in The Netherlands where he could live in comparative comfort on the compensation which would be paid him under the Norwegian law.

The time passed on and Van der Weyde called upon the Norwegian consul and requested payment of compensation and he was informed that the money was lying in Norway under a Norwegian insurance act and every few months afterwards Van der Weyde called at the office of the consul and inquired whether his compensation had been received. Eventually, on the 11th of January, 1929, Van der Weyde appealed to the Minister from The Netherlands at Washington, requesting his assistance in securing the payment

of the compensation which had been promised in open court, and the reply of the Minister under date of February 9, 1929, shows that The Netherlands Minister was not much concerned over the injustice done his fellow countryman by another government. Libelant continued to press the local consul for payment of his compensation until the filing of the libel against the Taigen Maru, when the Norwegian consul again appears and makes the same protests.

On these facts we believe that Judge Cushman abused his discretion in refusing to assume jurisdiction of the cause on the merits. We recognized that there is a long list of authorities opposed to these views. The case of *Canada Malting Co., Ltd.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413, 1932 A. M. C. 512, treats on this subject and reiterates the rule that the exercise of the discretion to retain jurisdiction will not be disturbed unless abused. The case arose out of the collision of two vessels, both of Canadian registry, which occurred in American waters. There was an advantage to be secured in respect to the assessment of damages against the vessel at fault under American maritime law which did not exist under the Canadian law. Jurisdiction was contested on the ground that the suit was wholly between foreigners. The District Court declined jurisdiction and dismissed the libel and appeal was taken to the Circuit Court of Appeals which affirmed the order of dismissal, and the Supreme Court allowed a review. It was contended that the District Court had abused its discretion in declining jurisdiction, since the cause of action arose within the territorial limits of the United States, and it was sought to apply certain statements in *The Belgenland*, 114 U. S. 355, to create an exception to the rule. The Court held there was no abuse of discretion in refusing to exercise jurisdiction, observing that if the libelants were entitled

to have the law of Canada applied, "the Canadian courts will, it must be assumed, give effect to it." In the course of the opinion the Court uses the following language;

> "The suggestion drawn from the language in *Belgenland, supra*, that such discretion exists only 'in cases arising beyond the territorial jurisdiction of the country to which the courts belong,' is without support in either the earlier or the later decisions of this Court. Nor is it justified by the language relied on, when that language is read in its context."

A most careful consideration of this principle of law is made and a careful selection of authorities is given in a carefully prepared note.

The case of *The Eir* (*Carl Persson* v. *Falsen*), C. C. A. 60 F. (2d) 124, 1932 A. M. C. 1043, is a case in point, and it was held that the court should retain jurisdiction under identical circumstances. The facts were as follows: Persson, a Swedish seaman, signed on as a member of the crew of the Eir, a Norwegian vessel, at Mobile, and while the vessel was lying at Hampton Roads he and other members of the crew were engaged in chipping the furnace when a bit of matter lodged in his eye, as a result of which he libeled the vessel in the District Court for the Eastern District of Virginia, at Norfolk. It was moved that the trial court decline to take jurisdiction and a hearing was had upon this question. Testimony was taken and the vice-consul of Norway at Norfolk filed a protest against the court taking jurisdiction on the ground that the controversy lay between a Swedish seaman and a Norwegian ship, and that by the Norwegian law a seaman may not receive damages for personal injuries from a ship, but is entitled to share in an insurance fund provided by the Norwegian government and maintained at the expense of ship owners for the purpose of providing compensation to injured seamen. The trial

court declined to take jurisdiction and dismissed the libel and an appeal was brought to the Circuit Court of Appeals for the Fourth Circuit. In a *per curiam* opinion before Judges Parker, Northcott and Soper, the order of the trial court was reversed and the District Court was directed to take jurisdiction of the suit and proceed to a determination of the issues involved.

Although, as the statement of facts, discloses, jurisdiction was refused in the first instance on the same ground as Judge Bean refused it, namely, that the libelant would be paid insurance from a compulsory insurance fund, the only difference between Van der Weyde's claim for the exercise of jurisdiction, and Persson's claim, is one of nationality of the seamen. The Court of Appeals held that the refusal to take jurisdiction was a "clear denial of justice" for the reason that libelant's only remedy was an appeal to the authorities and courts of Norway.

In the case of *The Tricolor,* 1933 A. M. C. 919, while the Circuit Court of Appeals sustained the refusal of the trial court to assume jurisdiction, the court made an observation which we think is applicable here (L. Hand, Chief Justice):

> "Both sides concede that had the Dutch shipper itself moved in the suit; jurisdiction would have depended upon the discretion of the court; each party would have been an alien, and the district court is not obliged to try such cases; its jurisdiction depends upon whether its exercise is essential to justice; whether the libelant is driven to seek it in order to secure any adequate redress at all."

The refusal of the court to retain jurisdiction was an abuse of its discretion. The record clearly shows that the Norwegian consul in Portland either never took any action looking towards the payment of monthly compensation, or if he did, he was unable to secure the payment of the com-

pensation from the Norwegian authorities having control over the fund, and instead of informing Van der Weyde of the true situation, he kept leading him on to believe that sooner or later the money would be paid him—it was "lying in Norway" for him. Consequently, with these facts before it, unless there were some other compelling reasons the trial court should have retained jurisdiction of this case, and proceeded to adjudicate the cause on its merits.

II.

The Seamen's Act Abrogates Treaty Provisions.

Libelant signed on this vessel in an American port for a voyage between the Columbia River and the Orient, to be discharged at Pacific Coast ports. The charter of the vessel to the American Asiatic Steamship Company will appear of record in these proceedings. It is to be noted that this company is an Oregon corporation, and purports to be engaged in shipping. The Luise Nielsen was chartered for certain voyages, all between the Pacific Coast and the Orient and return, so that the practical effect of the charter is to make the vessel, for all intents and purposes, an instrument of commerce between the United States and foreign countries, and the so-called rule of the "law of the flag" becomes a mere figure of speech so far as any materiality to this case. Signing on members of the crew at Pacific Coast ports to be discharged at Pacific Coast ports and the vessel carrying commodities fabricated in the United States, should be legally held to confer jurisdiction on our courts in cases of rights growing out of the conduct of the voyage. Assuming that the vessel was unseaworthy when she left the Columbia River and part of her cargo was lost or destroyed, would our courts be deprived of jurisdiction on account of the fact that the vessel flew a foreign flag and was navigated by a resident of Norway and a few of the commanding officers

of the vessel were also Norwegian citizens? Of course, in such a case, the court would inherently have jurisdiction. Why should there be any distinction between the rights of the crew who signed on in a port of the United States to be discharged in a port of the United States, who are injured owing to the unseaworthiness of the vessel, as is shown in this case? Fundamentally, there is no difference in the two cases. The Circuit Court of Appeals, referring to the treaty, held that the treaty provisions abrogated any right of members of the crew to make a claim in the courts of that state, although their voyage was completed in the United States.

Many trial courts have given too much deference to the claims of alien vessels to release themselves from liability in the territorial waters of the United States and the application of the so-called "law of the flag" has been the source of preventing many a seaman from securing redress for his wrongs, and I think it fair to say that this Court has held that the treaty provisions referred to have been abrogated by the adoption of the Seamen's Act.

I am referring to the case of *Strathearn Steampship Co.* v. *Dillon,* 252 U. S. 348, 350. In that case the question involved was whether seamen on foreign vessels in American ports were entitled to receive one-half pay of the wages earned before the voyages were ended, notwithstanding contractural obligations to the contrary, and it was held that the provisions of the Seamen's Act were applicable. The Court reached a conclusion in that case that the jurisdiction of the United States over foreign merchant vessels in our ports was such as to enable Congress to make provision that foreign vessels in our ports should be governed by the same rule. The Court went on to say that it was for this Government to determine upon what terms and conditions vessels of other countries might be permitted to enter our harbors, and to impose conditions upon the ship-

ment of sailors in our own ports, and make them applicable to foreign as well as to domestic vessels. In conclusion this Court said:

> "Upon the authority of that case, and others cited in the opinion therein, we have no doubt as to the authority of Congress to pass a statute of this sort, applicable to foreign vessels in our ports, and controlling the employment and payment of seamen as a condition of the right of such foreign vessels to enter and use the ports of the United States."

III.

The next question before the Court is one relating to the plea of *res judicata:* that is, whether the judgment in the former suit, where the District Court dismissed the suit on a protest of the Norwegian consul, can be successfully pleaded in bar to this suit.

In the first place, it should be noted in the response to the exceptions of the Ocean Transport Company, Ltd., claimant, that during the hearing on the intervention before Judge Bean the Norwegian consul promised Judge Bean that he would see that compensation according to the laws of Norway would be paid libelant, and it was for this reason that Judge Bean dismissed the libel. In the response to the exceptive allegations of Anderson, the acting consul of Norway at Seattle, the same claim is made. So we have here a promise that a monthly compensation under the Norwegian insurance would be paid Van der Weyde. These allegations go to show that the trial court denied jurisdiction on a promise which has not been subsequently fulfilled, viz., the payment of compensation, and which the trial court had every reason to believe would be paid by the previous conduct of the Norwegian authorities in paying Van der Weyde's medical and hospital care.

Courts have long held that a judgment secured under false promise of a compromise would be set aside, and we

believe that the promise made to Judge Bean by the consul during the proceeding on intervention is analogous to securing a judgment by a false promise of compromise, and consequently whatever force there may be to a court decree recognizing the protest of a consul, the decree can be successfully attacked for the usual grounds that decrees may be attacked.

Freeman on Judgments, 5th Ed., Sec. 1214, page 2523, states a salutary rule as follows:

> "But it is, of course, true that the judgment from which relief is sought does not operate as *res judicata* as to the matters adjudicated by it where a party has been prevented from presenting his case by fraud, mistake or other matters affording ground for equitable relief."

Again in Section 1243, page 2587, the author comments upon agreements between parties in relation to pending litigation, and the courts have uniformly set aside judgments thus obtained. The rule is stated thus:

> "It has frequently happened that one of the parties litigant has failed to present his claim or defense because he relied upon some agreement or understanding between himself and his adversary which, if observed, rendered such presentation unnecessary. And with more than occasional frequency, if we may judge from reports, these agreements have been designed to lull a party into security and inactivity in order that some unconscionable advantage could be taken of him. In all such cases, courts of equity, when asked to do so, have invariably restored the injured party to his rights, under the agreement, and have wrested from his opponent all those fruits he had hoped to harvest and enjoy through fraud and duplicity. 'The cases are full and explicit upon the point; a judgment obtained in violation of an agreement of compromise, and by which an appearance is prevented, will not be allowed to stand'."

In the case of *Chicago, R. I. & P. R. Co.* v. *Callicothe,* C. C. A., 267 F. 799, the plaintiff obtained a judgment in the State courts of Missouri for damages against a railroad company, and the case was appealed to the Supreme Court and application was made for writ of error *coram nobis,* etc., all of which were still pending when the railroad company filed suit in equity in the Federal Court to enjoin the enforcement of the judgment and to set aside the judgment obtained. It was alleged that the injuries alleged to have been received by the plaintiff were simulated, that he, aided by co-conspirators, feigned paralysis of his lower limbs and produced an apparent paralysis of his lower limbs and that the paralysis could not be detected by the usual medical tests, although such tests were made, and that plaintiff testified falsely that the paralysis was genuine and the result of injury, that plaintiff kept himself secreted in his house, and that the railroad company, by reason of the acts of the conspirators, was unable to determine the falsity of his claims until after the recovery of the judgment. The Court of Appeals held that a sufficient showing had been made to justify the court in restraining the execution of the judgment.

Reference is made to the leading case of *U. S.* v. *Throckmorton,* 98 U. S. 61, and practically all subsequent decisions, both in Federal and State courts are cited and discussed in the opinion. The rule quoted is recognized by this Court in *Nelson* v. *Meehan,* C. C. A., 155 F. 1, but it was held that the facts did not justify the application of the rule.

In the *Throckmorton* case, *supra,* the Supreme Court announces the rule as follows:

> "But there is an admitted exception to this general rule, in cases where, by reason of something done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from

exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. (Citing cases.)

"In all these cases and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court."

While we know of no precedent that decisions upon consular protests become *res judicata,* it seems very doubtful whether this doctrine should be applied in a case where the suit is discretionary as to whether the court will retain jurisdiction upon the merits.

IV.

Laches.

This defense is urged, but if the basis of a claim is well founded, then the respondents are estopped to assert the defense, unless the Ocean Transport Co., Ltd. could be said to be an innocent purchaser for value. It is the undisputed fact in this case that the Luise Nielsen was sold to her present Japanese owners with a warranty of title, and the record herein discloses that the vessel is insured against

this loss by a Norwegian insurance company, and that this company is the real party in interest in making the defense. Consequently the parties are not different in this proceeding and the court has obtained jurisdiction to render a judgment against the vessel, which will undoubtedly be paid if the claim is one of merit, by those who have been paid a premium to pay it. The protest of the Norwegian consul shows that the vessel was sold under a warranty of title and that the owners were bound to indemnify the purchasers against this claim, and it was for this reason that an appearance was made in the case. It was the conduct of the Norwegian authorities, undoubtedly acting at the instance of the owners, which prevented the assertion of this claim before the vessel was sold. Furthermore, there is nothing shown in the respondent's pleadings which would justify the conclusion that respondent is any worse off by reason of the delay. In fact, it is shown by libelant that practically all of the eye witnesses to the accident are still living in the Northwest and can be reached by process of court.

The defense of *laches* should, of course, be taken by answer and not by exception, but unless the respondent can show that it was materially prejudiced, it is not entitled to assert the defense of *laches* in admiralty.

In the case of *The Fulton,* C. C. A. 54 F. (2d) 467, there was a ten year delay before a case was disposed of—four years having expired after the accident before a suit was brought, and one witness had died, and the court held that this should not defeat the claim, but imposed penalty that the prevailing party should not be paid interest.

The case of *Griffith* v. *Seaboard Midland Petroleum Co.,* not yet officially reported, 1933 A. M. C. 911, is much in point. The libel was not filed until four and one-half years after the accident. A libel was prepared shortly after the

accident, but an office boy neglected to file it. A multitude of adverse circumstances against the assertion of the claim appear in the record, such as the death of the doctor who examined the libelant, death of members of the crew, insolvency of the insurer, and the sinking of the vessel, but the court held that the claim was not barred by *laches* under the particular facts of the case.

So in this case, there is nothing in the record tending to show that the real party in interest is any worse off than it would otherwise have been. We believe that in view of what has here been said, on the whole record as made, Judge Cushman's refusal to retain jurisdiction of the case was a denial of justice to the libelant and should be corrected by this Court in a decree directed to the District Court to proceed to the trial of the case on the merits

Respectfully submitted,

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